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March 4, 2005

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**VIA HAND-DELIVERY**

The Honorable Charles L.A. Terreni  
 Chief Clerk/Administrator  
**Public Service Commission of South Carolina**  
 101 Executive Center Drive  
 Columbia, South Carolina 29210

RECEIVED  
 2005 MAR -4 AM 10:45  
 SC PUBLIC SERVICE  
 COMMISSION

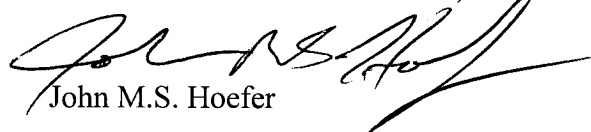
RE: Application of Carolina Water Service, Inc. for adjustment of rates and charges for the provision of water and sewer service and modification of rate schedules; Docket No. 2004-357-W/S

Dear Mr. Terreni:

Enclosed for filing are the original and five (5) copies of the Applicant's Answer in Opposition to Petition and Motion in the above-referenced matter. I would appreciate your acknowledging receipt of these documents by date-stamping the extra copy that is enclosed and returning it to me via our courier.

By copy of this letter, I am serving ORS and DHEC and enclose my certificate of service to that effect. If you have any questions, or need additional information, please do not hesitate to contact me. With best regards, I am

Sincerely,

**WILLOUGHBY & HOEFER, P.A.**


John M.S. Hoefer

JMSH/twb

Enclosures

cc: Florence P. Belser, Esquire  
 Jessica J.O. King, Esquire

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION OF**  
**SOUTH CAROLINA**  
**DOCKET NO. 2004-357-W/S**

RECEIVED  
2005 MAR -4 AM 10:45  
SC PUBLIC SERVICE  
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IN RE:

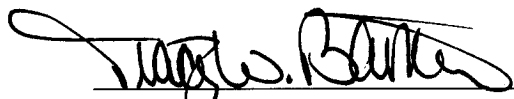
Application of Carolina Water Service,  
Inc. for adjustment of rates and charges  
and modification of certain terms and  
conditions for the provision of water and  
sewer service.

**CERTIFICATE OF SERVICE**

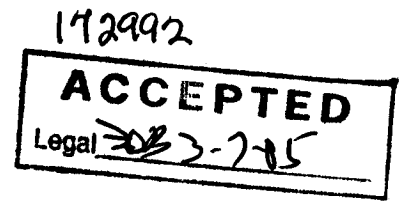
This is to certify that I have caused to be served this day one (1) copy of Applicant's Answer in Opposition to Petition and Motion Application by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Florence P. Belser, Esquire  
Office of Regulatory Staff  
Post Office Box 11263  
Columbia, South Carolina 29211

Jessica J.O. King, Esquire  
DHEC  
Chief Counsel for EQC  
2600 Bull Street  
Columbia, South Carolina 29201

  
Tracy W. Barnes

Columbia, South Carolina  
This 4<sup>th</sup> day of March, 2005.



BEFORE

THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA

DOCKET NO. 2004-357-WS

IN RE:

Application of Carolina Water Service,  
Inc. for adjustment of rates and  
charges and modification of certain terms  
and conditions for the provision of water  
and sewer service.

APPLICANT'S ANSWER IN  
OPPOSITION TO PETITION  
AND MOTION

Applicant, Carolina Water Service, Inc. ("CWS" or "Company"), pursuant to 26 S.C. Code Ann. Regs. R. 103-837 (1976), submits the within Answer in Opposition to the Petition to Intervene and Motion of the South Carolina Department of Health and Environmental Control ("DHEC") dated March 1, 2005, and filed with the Commission in the above-captioned matter. In that regard, CWS would respectfully show unto this Honorable Commission as follows:

1. DHEC's Petition to Intervene fails to satisfy any of the three (3) requirements for a petition to intervene under 26 S.C. Code Ann. Regs. R. 103-836.A.(3)(1976) for the reasons discussed hereinbelow.

(A) There is no statement of facts which demonstrate that DHEC has a right or interest that can properly be addressed by the Commission in this rate case matter. R. 103-836.A.(3)(a).

Initially, and as a matter of law and fact, CWS takes issue with DHEC's assertion that "[o]n information and belief, each of the individual systems comprising CWS's customer base serves a small fraction of the total customer base." In making a determination as to whether DHEC's petition

and motion should be granted, the Commission should not rely upon allegations of fact made upon information and belief because they are, by definition, not based upon any personal knowledge of DHEC. The Supreme Court of South Carolina has held that, in considering a motion for summary judgment, a trial court may not properly rely upon a **verified** pleading containing factual allegations made upon information and belief. *See Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003). Here, in addition to being admittedly not based upon personal knowledge of the agency, the DHEC petition and motion is not verified. CWS submits that the Commission should therefore not consider DHEC's contention in this regard in making a determination as to whether to grant the petition and motion. Moreover, DHEC's "information and belief" is incorrect as a matter of fact. To the contrary, 88% of CWS's customers who receive sewer treatment service are served by just four of its ten wastewater treatment plants.

For several reasons, also flawed is DHEC's contention that the provision in CWS's current rate schedule permitting the pass-through of bulk sewer charges "has the **practical effect** of allowing/requiring CWS to recover costs of bulk treatment provided by a third party in a way which is substantially different from the mechanism by which it is allowed to recover costs of capital improvements, even if such improvements affect only one system." [Petition at 2, ¶1 (emphasis added).] First, the language referenced by DHEC (which is set out on Page 5, Section 1 of CWS's sewer rate schedule approved by this Commission in its Order No. 2001-887, Docket No. 2000-207-W/S) is not self-executing. In other words, CWS is not free to implement the pass-through of bulk charges without approval of this Commission. This is reflected in the very Commission order cited by DHEC involving CWS's Lincolnshire/Whites Creek facility in Georgetown County in which CWS was denied the ability to pass-through to its affected customers bulk service charges sought

to be collected by the Georgetown County Water and Sewer District (“GCWSD”). See Order No. 2001-360, Docket No. 2000-511-S, April 18, 2001. Second, and more to the point, there is no interconnection issue before the Commission in the instant docket as there was in Docket No. 2000-511-S. CWS submits that DHEC’s **general** interest in how this Commission determines whether it will approve proposed interconnection agreements implicating the pass-through provision of the utility’s rate schedule does not present a ripe issue which DHEC may have resolved in the instant docket.<sup>1</sup> And, third, there is no hard and fast rule binding upon the Commission that would dictate that it require CWS to recover bulk service expenses as part of its total expenses spread among all customers as DHEC suggests should be the case. [Petition at 2, ¶ 1.] Cf. *August Kohn and Co., Inc. V. Public Serv. Com’n*, 290 S.C. 409, 313 S.E.2d 631 (1984) (recognizing that differences in circumstances and conditions between different parts of a utility’s service territory may justify departure from uniform rate structures).

Likewise, DHEC’s conclusory assertion that Commission’s determination in Order No. 2001-360 demonstrates how the pass-through language of the Utility’s rate schedule “has the effect of **thwarting** implementation of area-wide wastewater treatment plans established pursuant to Section 208 of the Federal Clean Water Act, which DHEC has an interest in seeing put into effect” [Petition at 2. ¶1 (emphasis supplied)] is not only factually incorrect, but falls far short of meeting the requirement of R. 103-836.A.3(a). As DHEC is aware, it has settled with CWS litigation

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<sup>1</sup> As DHEC acknowledges, the portion of CWS’s current rate schedule permitting the “pass-through” of bulk charges of governmental utilities is not at issue in this case. [Petition at 1, ¶1.] Moreover, the fact that the Utility has had bulk sewer arrangements approved by this Commission belies the contention of DHEC that the pass-through provision is in and of itself a barrier to Section 208 planning by local councils of government. *See, e.g.*, Order No. 96-590, Docket No. 96-040-W/S, August 26, 1996 (order approving interconnection agreement for CWS Riverhills wastewater facilities with those of York County).

involving the wastewater treatment facility at issue in Docket No. 2000-511-S.<sup>2</sup> As part of that settlement, the CWS Linclonshire/Whites Creek WWTP could still be required to be interconnected with the facilities of GCWSD under the terms of the 208 Plan promulgated by the Waccamaw Regional Council of Governments. Thus, to assert that this 208 Plan has been **thwarted** by Commission Order No. 2001-360 is not accurate.

Moreover, there is no basis in law for this Commission to determine a utility's entitlement to rate relief based upon DHEC's concerns over its ability to achieve desired outcomes with respect to Section 208 water quality planning under the Federal Clean Water Act. In fact, DHEC is not even a member of any regional council of government referenced in its petition and to which the Section 208 planning function has been delegated by the General Assembly. *See* S. C. Code Ann. §§ 6-7-110 – 140 (1976). Thus, DHEC has no direct statutory interest in the implementation of Section 208 water quality management plans it mentions. And, since DHEC lacks legal standing to participate in this matter (see discussion in paragraph 2, *infra*) it cannot, as a matter of law, have an interest or right implicated by the instant proceeding.

- (B) DHEC's Petition to Intervene fails to state any grounds.  
for its proposed intervention R. 103-836(A)(3)(b).

DHEC's interest in regulating discharges of treated wastewater [Petition at 2, ¶2(a)] is in no way implicated by the instant proceeding. Nothing that this Commission can do in the context of an application under S.C. Code Ann. §58-5-240 (Supp. 2004) will prevent DHEC from discharging its statutory duties. Therefore, this is not a ground supporting DHEC's intervention in this case.

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<sup>2</sup> See Consent Order Approving Settlement Agreement, *Carolina Water Service, Inc. V. South Carolina Department of Health and Environmental Control*, Case No. 00-CP-40-2790 (Ct.App., June 9, 2004) (copy attached).

Furthermore, even assuming that DHEC has demonstrated a right or interest which could constitute a ground for its intervention in the instant application for adjustment of rates, DHEC has offered no explanation of how that right or interest **is in fact** affected by this proceeding.

For example, DHEC's contention with respect to the elimination of CWS's Lincolnshire, Friarsgate, I-20, Watergate, Kings Grant and Teal on the Ashley WWTPs is not grounds for intervention because it is at best speculative and at least premature. [Petition at 2, ¶ 2(b).] DHEC provides no information with respect to the date when the referenced WWTPs will be eliminated (i.e., the date when it is anticipated that a line to a regional facility will be complete and available), the identity of the publicly owned treatment works plant to which it is to be interconnected, or the bulk rates (if any) that would result from such an interconnection. Moreover, DHEC's contention assumes that the 208 Plans in question require that there be an interconnection. The Commission can take notice that it is possible that there could be a transfer of these WWTPs to a publicly owned treatment works instead of an interconnection. Further, DHEC can always petition to intervene when and if there is a proceeding before the Commission dealing with a proposed interconnection as it did in Docket No. 2001-360-W/S. Also, until such time as elimination of these WWTPs is required, it is always possible that the pertinent 208 plan could be amended to permit them to continue in operation.

Similarly, DHEC's reliance upon S.C. Code Ann. § 58-5-300 (1976) to demonstrate grounds for its proposed intervention is misplaced. [Petition at 2, ¶2(c).] DHEC asserts that the Commission is "required to consider all *factors* bearing on a *proposed tariff amendment*." Pet. at 2. (emphasis supplied.) First, § 58-5-300 only requires the Commission to consider all *facts* which it may determine to have a bearing on the proper determination of an application – even if such *facts* are

not set forth in the application. DHEC's petition does not seek Commission consideration of a fact not pleaded by CWS in its application. Rather, DHEC seeks consideration of an **issue** that is not before the Commission. Second, as acknowledged by DHEC, there is no "proposed tariff amendment" in this case pertaining to the Company's right to pass-through bulk charges. Third, by its own terms, § 58-5-300 pertains only to determinations by the Commission under S.C. Code Ann. § 58-5-290, while the instant case involves only a determination by the Commission under S.C. Code Ann. § 58-5-240.

Along these same lines, DHEC's assertion that the relief it seeks "will affect present customers of CWS who **may be potentially** affected by impact fees and treatment charges which CWS will pass through if connection to a regional facility is approved" [Petition at 2, ¶2(d)(emphasis supplied)] is not a ground supporting intervention. In addition to the speculative nature of this contention, DHEC is not statutorily authorized to represent the interests of CWS's customers. See S.C. Code Ann. §§ 58-4-10(B)(1) and 58-4-50(A)(4) (Supp. 2004). Rather, it is the duty of the Office of Regulatory Staff ("ORS") under these statutory provisions to represent the interest of the consuming public in this case, which it is doing.<sup>3</sup>

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<sup>3</sup> Similarly, the interests of customers of CWS can be protected by ORS (or the customers themselves) in any proceeding in which an interconnection agreement is submitted for the Commission's consideration. See S.C. Code Ann. 58-4-10(B) (Supp. 2004). CWS is puzzled by DHEC's assertion that such a proceeding will "fail[] to consider all relevant factors and fail[] to balance the Commission's responsibility to ensure a return fair to company and customer with the equally legitimate interests embodied in the area-wide wastewater treatment plans required by the Clean Water Act." [Petition at 2-3, 2(f).] DHEC participated in Docket No. 2000-511-S as an intervenor and party of record. Unless DHEC chooses not to participate in future interconnection agreement dockets, whatever factors it – or any other party of record – considers to be relevant can be placed before the Commission for its consideration.



- (C) DHEC's Petition to Intervene does not set forth any position on the matter before the Commission. R. 103-836(a)(3)(c).

DHEC admits that it has no position on CWS's proposed adjustments to its rate schedule and "requests that the [Commission] grant this Petition for Leave to Intervene and grant the Motion to expand the scope of this hearing to encompass the pass-through provisions of CWS's tariff ." [Petition at 3, ¶3.] In other words, DHEC's position is that it will only have a position on a matter which it recognizes is not currently before this Commission. CWS submits that such is far too tenuous and indefinite to satisfy the requirements of R. 103-836(A)(3)(c).

2. CWS further submits that DHEC lacks standing to participate in proceedings before the Commission for approval of rate adjustments pursuant to S.C. Code Ann. § 58-5-240. DHEC is not a customer of CWS and therefore has no rights of its own to protect. Moreover, and as noted above, only ORS, and not DHEC, has statutory authority to appear in matters before the Commission in a representative capacity. As a creature of the legislature, DHEC has only the powers given it by the General Assembly. *See Triska v. S.C. Department of Health and Environmental Control*, 292 S.C. 190, 355 S.E.2d 531 (1987). For purposes of implementing and enforcing the Clean Water Act and Pollution Control Act, DHEC has its own administrative procedures that it may pursue.<sup>4</sup> DHEC therefore has no standing to appear in this matter.

3. Alternatively, should the Commission determine that DHEC may be permitted to intervene in this matter, its motion to expand the scope of this proceeding to address the language

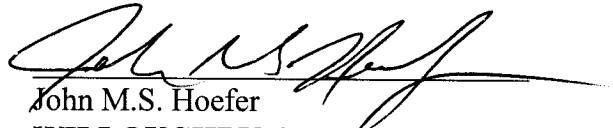
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<sup>4</sup>In fact, even if DHEC could demonstrate standing in the instant case for purposes of furthering the implementation of the Clear Water Act and Pollution Control Act, a serious question would arise with respect to the Commission's authority to treat issues arising under the Pollution Control Act.

of CWS's rate schedule permitting the pass-through of bulk sewer charges should be denied as being premature and without basis in law. In response to a motion by the Consumer Advocate, then a statutorily recognized representative of consumer interests in rate cases, the Commission ruled in the Company's last rate case that it would not expand the scope the case to consider issues not raised in the utility's application. Order No. 2001-498, Docket No. 2000-0207-W/S. DHEC has provided no basis for the Commission to depart from this precedent and CWS submits that none exists. See *330 Concord Street Neighborhood Ass'n v. Campsen*, 309 S.C. 514, 424 S.E.2d 538 (Ct. App. 1992) (holding that an administrative agency may not act arbitrarily in failing to follow its own precedents). Further, a "motion to expand scope of proceeding" is not a motion that is permitted under the statute pertaining to rate cases, S.C. Code Ann. § 58-5-240(B) or the Commission's rules. See 26 S.C. Code Ann.R. 103-841 (1976). Also, DHEC's motion fails to set forth with any specificity what relief it would have this Commission grant to DHEC. Finally, assuming that DHEC seeks some modification of CWS's rate schedule provision pertaining to the pass-through of bulk charges, no notice of same has been provided to CWS's customers of that fact – some of whom may well not agree with DHEC's position. Until such time as notice of the specific relief sought is provided (at DHEC's expense) the Commission cannot, as a matter of law, take up DHEC's motion. See *Porter v. SCPSC*, \_\_\_ S.C. \_\_\_, 525 S.E.2d 866 (2000); also Order No. 2001-498, *supra*.

Having fully set forth its answer in opposition, CWS respectfully requests that DHEC's petition be denied. Alternatively, should the petition be granted, CWS requests that DHEC's motion to expand the scope of this proceeding be denied.

[SIGNATURE PAGE FOLLOWS]



John M.S. Hoefer

**WILLOUGHBY & HOEFER, P.A.**

Post Office Box 8416

Columbia, South Carolina 29202-8416

803-252-3300

Attorneys for Applicant

Columbia, South Carolina  
This 4th day of March, 2005

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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Case No. 00-CP-40-2790

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Carolina Water Service, Inc., ..... Appellant,

v.

South Carolina Department of Health  
and Environmental Control, ..... Respondent.

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**CONSENT ORDER APPROVING SETTLEMENT AGREEMENT**

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Pursuant to Rule 232, SCACR, the parties have agreed to settle all issues in this appeal, as follows:

1. This Settlement Agreement is to be submitted to the South Carolina Court of Appeals for approval by its Order in compliance with Rule 232, SCACR, and returned to DHEC for it and Carolina Water Service, Inc. (CWS) to certify that the provisions of this Agreement have been satisfied with respect to CWS's Whites Creek-Lincolnshire wastewater collection and treatment facility (WWTF).
2. CWS shall submit plans and specifications and an application for a Permit to Construct an upgrade for the WWTF; DHEC waives the requirement for a PER. CWS shall construct and place the upgrade into operation not later than one thousand ninety five (1095) days from the date of this Agreement.

3. DHEC will issue a draft National Pollutant Discharge Elimination System (NPDES) Permit for this WWTF for a five-year term, which shall be based on the following discharge limits, and may include other limits as required by applicable regulations and wasteload allocations:

Flow = 0.125 MGD Weekly Average;

BOD<sub>5</sub> = 6.0 mg/l;

NH<sub>3</sub>-N = 1.0 mg/l & 4.23 mg/l (Summer & Winter, respectively);

Dissolved oxygen = 6.0 mg/l;

Total residual chlorine = .011 mg/l (detection limit would govern compliance); and

Fecal coliform = 200/100 ml.

The permit will include the following:

“Pursuant to the Pollution Control Act, S.C. Code Ann. §§ 48-1-50 (1987) and 48-1-100 (Supp. 2000), CWS shall:

(a) after three hundred sixty-five (365) days from June 10, 2004, CWS will:

(i) annually correspond with the Regional Provider (provider) (with copy of the letter to DHEC), requesting any changes that the provider has made in the proposed connection agreement;

(ii) report within sixty (60) days such written response by the provider to DHEC as to the status of the proposed agreement; and

(iii) confer with DHEC to discuss changes to the proposed rates, charges, and connection costs related thereto, as well as any regulatory changes.

(b) Not later than one thousand ninety five (1095) days from June 10, 2004, CWS shall place the upgrade into operation.

(c) After one thousand two hundred seventy seven (1277) days from June 10, 2004, if DHEC determines that the terms and conditions of the connection agreement disapproved by Public Service Commission Order No. 2001-293 have been sufficiently

modified or amended by the Regional Provider, or there has been any relevant change in the PSC's regulations, State law, or the Permittee's (CWS's) tariff, or the Permittee's rates have been sufficiently increased so as to justify the resubmission of an application for approval of a connection agreement by the PSC, the Permittee shall:

(i) within thirty (30) days of notice by DHEC request of the provider a connection agreement and submit the proposed connection agreement to the South Carolina Public Service Commission (PSC) for its approval within sixty (60) days of receipt of the proposed agreement;

(ii) complete construction within one hundred eighty (180) days of receipt of PSC approval;

(iii) submit all record drawings and Engineer's certification letter to DHEC within thirty (30) days of completing construction; and

(iv) discharge to the Regional System upon receipt of DHEC approval to place in operation."

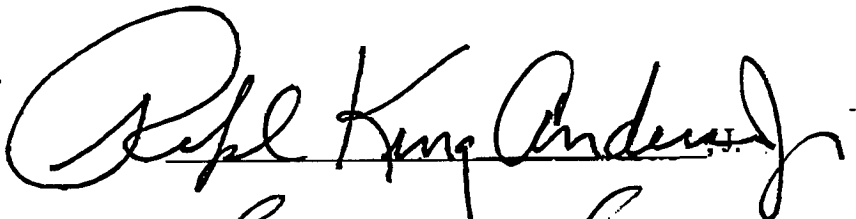
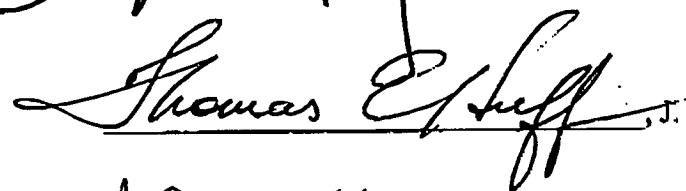
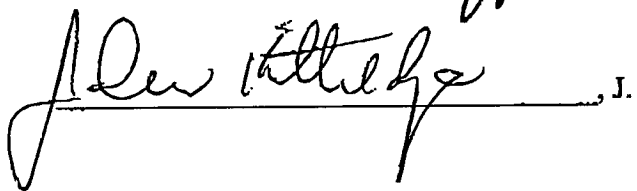
4. In consideration of this Agreement, CWS agrees to forego the return of the \$20,000 in fines it has previously paid to DHEC, concerning the matters in the appeal herein, and DHEC agrees that there will be no fines for any other violations by the WWTF that have occurred or may have occurred to date.

5. The parties agree that if, for some reason beyond their control, this Settlement Agreement is not approved in a timely manner, the issues are preserved for appeal.

6. Each party will bear its own court costs.

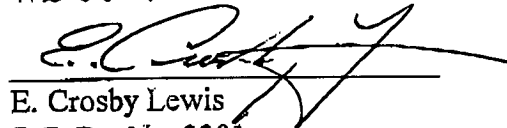
7. The parties will expeditiously take all steps both to obtain approval of this Settlement Agreement and the implementation of its terms.

IT IS SO ORDERED.

June 10, 2004

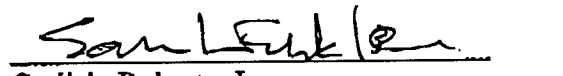
WE CONSENT:

  
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Raymon E. Lark, Jr.  
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June 9, 2004

  
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**Attorneys for Respondent**

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South Carolina Court of Appeals  
Clerk's Office, Columbia, S. C.  
FILED 6/10/2004

  
Clerk